



**EFFECTIVE DATE**  
**6 NOVEMBER 2017**  
**AS MODIFIED ON APRIL 30, 2021**

## **FOMB POLICY: REVIEW OF CONTRACTS**

### **AUTHORITY**

This FOMB Policy (the “Policy”) is established pursuant to Section 204(b)(2) of PROMESA to require prior FOMB approval of certain contracts to assure that they “promote market competition” and “are not inconsistent with the approved fiscal plan.” This Policy also underlines the sense of Congress as provided in Section 204(b)(3) that any policy under Section 204(b)(2) should be designed “to make the government contracting process more effective” and “to increase the public’s faith in this process.” This Policy shall also apply as provided in Section 204(b)(5).

### **APPLICABILITY<sup>1</sup>**

This Policy applies to any contract that is proposed to be entered into by the Commonwealth (which includes the Executive, Legislative and Judicial branches of government) or any covered instrumentality. For the avoidance of doubt, purchase orders, grants, sub-grants, and tax abatement or similar tax relief agreements are considered contracts under the Policy.

This Policy applies to all contracts in which the Commonwealth or any covered instrumentality is a counterparty, including those with the federal government, state governments, private parties, and nonprofit organizations. As such, the Commonwealth or any covered instrumentality must inform potential contract counterparties, including federal government agencies, about this Policy and the requirement that the FOMB approve any contract pursuant to this Policy before execution.

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<sup>1</sup> Pursuant to Section 204(b)(4), the FOMB retains the authority to review any “rule, regulation, or executive order proposed to be issued by the Governor (or the head of any department or agency of the territorial government) in the same manner as such provisions apply to a contract.” Section 204(b)(5) likewise applies equally to such rules, regulations, and executive orders as it does to contracts. Accordingly, the FOMB established its Policy for the Review of Rules, Regulations and Orders.

In establishing this Policy, the FOMB is mindful of Section 204(d)(2) and does not intend to impede the implementation of any federal programs, particularly those related to disaster response and recovery. To the contrary, the FOMB established this Policy in large part to support

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the implementation of federal programs where federal funding and reimbursements are applicable, including, but not limited to funding and reimbursement for disaster aid spending.

Contracts executed prior to date of adoption of this Policy, shall, at the request of the FOMB, be subject to review by the FOMB to ensure that they do not “adversely affect the territorial government’s compliance with the Fiscal Plan”.

### **SCOPE OF REVIEW**

The FOMB will review contracts to determine whether they promote market competition and are consistent with the applicable fiscal plan. To the extent contracts are related to disaster aid spending, eligibility for federal funding and/or reimbursement will also be reviewed; provided, however, that the contracting parties retain responsibility for fulfilling any federal funding or reimbursement requirements notwithstanding any approval under this Policy.

While the FOMB retains the authority to expand the scope of its review, it will not generally engage in legal review of the contractual documentation or the contracting process, including without limitation: (i) compliance with contracting requirements under applicable laws, rules, and regulations, both federal and local and (ii) compliance with applicable laws, rules, and regulations governing procurement activities, both federal and local. In addition, the FOMB will not engage in any due diligence or background check with respect to the contracting parties nor review whether the contracting parties comply with the requirements under the applicable contract.

Notwithstanding, in order to ensure that certain contracts promote market competition, the FOMB may, **at its sole discretion**, require the Commonwealth or any covered instrumentality to give it access to ongoing procurement processes which will result in the execution of a new contract. The FOMB shall formally notify the contracting agency of its determination, after which the Commonwealth or covered instrumentality shall grant the FOMB access to the pertinent documentation. The FOMB shall issue its comments and recommendations on such processes within **twelve** business days, upon receipt of **all requested information**.

### **APPROVAL PROCESS**

All contracts or series of related contracts, inclusive of any amendments, modifications, or extensions, with an aggregate expected value of \$10 million or more, including any professional advisory or personal services contracts, purchase orders, grants, sub-grants, and tax abatement or similar tax relief agreements, must be submitted to the FOMB for review and approval **prior to execution**, subject to the time frames and limitations established hereunder, at [contracts@promesa.gov](mailto:contracts@promesa.gov). In addition, the FOMB will select, on a random basis or otherwise in its

sole discretion, contracts **below the \$10 million threshold**, to assure that they promote market competition and are not inconsistent with the approved fiscal plan, including the measures provided therein. To effectuate this Policy, the FOMB may exercise the powers granted to it under PROMESA and take any actions it considers necessary, consistent with Sections 104(c), 104(k), and 204(b)(5) of PROMESA, including, but not limited to, the issuance of subpoenas or other legal remedies.

In addition, the contracting agency must include in its submission: (i) a completed copy of the Contract Submission Questionnaire, attached herein as Appendix A, (ii) the Agency Certification Requirement, attached herein as Appendix B, and (iii) the Contractor Certification Requirement<sup>2</sup>, attached herein as Appendix C. The FOMB may require additional information during the course of its review.

Following receipt of the proposed contract and **all required information and documentation**, the FOMB will notify the contracting agency by formal response within twelve business days whether the FOMB approves the contract, rejects the contract, or requires further information and/or modifications to the documentation. If the FOMB requires further information and/or modifications to the documentation from the contracting agency, the FOMB will provide a final response of either approving the contract or rejecting the contract within twelve business days of receipt of **all requested information** and/or confirmation of the modifications.

The FOMB will publish a list of copies of its final responses for all contracts reviewed pursuant to the Policy at [oversightboard.pr.gov/contract-review/](https://oversightboard.pr.gov/contract-review/).

To ensure the FOMB is able to review the proposed contracts expeditiously and to increase the likelihood that the FOMB will determine that the proposed contracts are consistent with this Policy, the Commonwealth or covered instrumentality, as applicable, **must** provide the relevant documents on an ongoing basis.

For **new contracts**, the Commonwealth or covered instrumentality, as applicable, **must** submit the required documentation within a minimum of **15 business days** prior to the contract's proposed execution date. In the case of proposed **amendments** to existing contracts, the Commonwealth or covered instrumentality, as applicable, **must** submit the required documentation within a minimum of **30 calendar days** prior to the proposed execution date of such amendment. In the event that the Commonwealth or covered instrumentality does not comply with these requirements, the twelve-business day review period for such contract or amendment will be deemed inapplicable.

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<sup>2</sup> The Contractor Certification Requirement (Appendix C of the Contract Submission Questionnaire) will require the names of all the owners and/or principal stakeholders for each subcontractor, if any, under Item 1 of the document. For purposes of the Contractor Certification Requirement submission, "principal stakeholders" shall mean all entities or individuals with an ownership or membership interest, as the case may be, equal to or higher than ten percent (10%) in a subcontractor identified in the Contractor Certification Requirement. "Principals" shall mean persons and entities that have full authority to act on behalf of each subcontractor.

## **REQUIRED CONTRACTUAL PROVISIONS**

All proposed contracts must include a provision **explicitly** stating that the contractor represents and warrants that the information included in the Contractor Certification Requirement, as included in Appendix C of the FOMB's Contract Submission Questionnaire, is complete, accurate and correct, and that any misrepresentation, inaccuracy or falseness in such Certification will render the contract null and void and the contractor will have the obligation to reimburse immediately to the Commonwealth any amounts, payments or benefits received from the Commonwealth under the proposed contract. This representation is required for all contracts and amendments to existing contracts to be executed by Commonwealth (which includes the Executive, Legislative and Judicial branches of government) or any covered instrumentality, irrespective of its amount.

Similarly, as required by the Certified Fiscal Plan, **all professional services contracts** and amendments to existing professional services contracts **must** include a provision requiring the adequate transfer of skills and technical knowledge from the contracting entity to pertinent public sector personnel, to the extent that such contracts or amendments contemplate recurring professional services that may be performed by appropriately trained government staff; provided, however, that this requirement shall not apply to contracts which contemplate **non-recurring professional services or specialized professional services that may not be performed by existing staff at the applicable governmental entity, including as a result of independence requirements**. Accordingly, in the event that a proposed contract or amendment contemplates such **non-recurring professional services or specialized professional services**, such contract or amendment must **instead** include a provision certifying that the transfer of skills and technical knowledge required by the Certified Fiscal Plan is inapplicable given the non-recurring **or specialized** nature of the contracted services.

For the avoidance of doubt, the FOMB's Code of Conduct applies to this Policy.

## APPENDIX A

### Contract Submission Questionnaire

- 1) Agency
  - a) Agency name:
  - b) Contact name:
  - c) Contact e-mail:
  - d) Contact phone number:
  - e) Person(s) who will sign the contract on behalf of the agency:
  - f) State what statute, regulation, or resolution authorizes such person(s) to execute the contract on behalf of the agency:
  
- 2) Contractor
  - a) Name:
  - b) Parent organization (if applicable):
  - c) Principals<sup>3</sup> and principal stakeholders<sup>4</sup> of the contractor and/or parent organization (if applicable):
  - d) State of organization:
  
- 3) Contract
  - a) Type (disaster relief or other):
  - b) Value: Contract Amendment: \$
  - c) Service or products description:
  - d) Timing (e.g., need processing by end of year before benefits expire):
  - e) New contract, amendment, or extension:
  - f) Language (Spanish or English):
  - g) Any related contracts (if applicable):
  
- 4) Commonwealth Certified Budget Questions:
  - a) For each source, referencing the current year's **Certified Budget for the Commonwealth of Puerto Rico** ("Certified Budget"), please specify:
    1. The line item from which this contract or amendment will be funded, and
    2. The dollar value to be drawn from the line item.

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<sup>3</sup> "Principals" shall mean those persons and entities that have full authority to act on behalf of each contractor.

<sup>4</sup> "Principal stakeholders" shall mean all entities or individuals with an ownership or membership interest, as the case may be, equal to or higher than ten percent (10%) in a contractor.

- b) If more than one line item referenced from the **Certified Budget** will fund the contract or amendment, please specify:
1. Each line item, and
  2. The dollar values to be drawn from each line item. Do not provide line items which do not appear in the Certified Budget or the total value of the line items as they appear in the Certified Budget.

- c) Do the line items referenced above from the **Certified Budget** fully cover the cost of the contract or amendment?

If the line items referenced do not fully cover the cost of the contract or amendment, which line items from the Certified Budget will need to be reprogrammed?

- d) If the contract (in its original form or as amended) extends past the current fiscal year, does the **Certified Budget line item(s)** include the full cost of the contract or only the portion applicable to the current fiscal year?
- ii. If only the portion applicable to the current Certified Budget, how much will be funded from the future budget?

5) Department or Agency Budget Questions:

- a) Are the funds for the contract included in your agency's or department's budget?
- i) If yes, in which allotment? Please specify (A) the line item(s) in the budget that this contract will be funded from (B) all accounts to be used for payments under the contract and (C) what other expenses have been committed or planned **for that budget item.**
- b) Does your agency's or department's existing budget fully cover the cost of the contract?
- If multiple line items, please specify the amount against each budget line
- i) If not covered in the budget, which allotments need to be reprogrammed?
- c) If the contract extends past the current fiscal year, does the current budget line item include the full cost of the contract or only the portion applicable to the current budget time period?
- i) If only the portion applicable to the current budget, how much will be funded from the future budget? Are the budget line items the same and are there sufficient funds within those? Please provide supporting evidence.
- d) Is the source of the funds for the contract or amendment the General Fund ("GF"), Special Revenue Funds ("SRF"), federal funds ("FF") Federal Reimbursement ("FR") or Federal Grant Funds ("FGF")?

- i) If the contract or amendment will be funded using multiple sources, please specify: 1. Each of the sources from which this contract or amendment will be funded, and 2. The dollar value to be drawn from each source.
- ii) If SRF will fund a portion or all of the contract or amendment, please specify the dollar value of all SRF revenues that your agency or department has collected to-date in the current fiscal year. Do not provide SRF revenue projections.

- e) Does your agency's or department's existing budget fully cover the cost of the contract? If multiple line items, please specify the amount against each budget line
  - i) If not covered in the budget, which allotments need to be reprogrammed?

- f) If the contract extends past the current fiscal year, does the current budget line item include the full cost of the contract or only the portion applicable to the current budget time period?
  - i) If only the portion applicable to the current budget, how much will be funded from the future budget? Are the budget line items the same and are there sufficient funds within those? Please provide supporting evidence.

6) Fiscal Plan Questions

- a) Is the contract consistent with the applicable Fiscal Plan? Please provide some commentary on why / why not.
- b) Does the contract constitute separate and additional disaster aid spending?
  - i) Will the contract be partially or fully federally funded?

7) RFP information

- (1) Name-
- (2) Issue date:
- (3) Due date:
- (4) Award date:
- (5) Applicable RFP rules and regulations:
- (6) Amendments (Yes or No):
- (7) Description of efforts undertaken to advertise the RFP:

8) Fund Availability Certification

(Government Entity Header)

**Fund Availability Certification**

The (Department/Agency/Instrumentality/Public Corp.) hereby certifies to the Financial Oversight and Management Board for Puerto Rico (the "FOMB"), that it has the necessary unrestricted and unobligated funds to be used for payments under the Proposed (Contract/Amendment/Purchase Order) between the (Department, etc.) and (Counterparty) for (Service/Order), as of the date of the approval request submitted to the FOMB, in the following accounts:

1. Account No. \_\_\_\_\_
  - a. Account No. \_\_\_\_\_ has \$ \_\_\_\_\_ budgeted for Fiscal year 2021.
  - b. As of the date of approval request submitted to the FOMB for (Contract/Amendment/Purchase Order), \$ \_\_\_\_\_ of the original amounts budgeted for Fiscal Year 2021 have been used or obligated.
  - c. As of the date of approval request submitted to the FOMB for (Contract/Amendment/Purchase Order), Account No. \_\_\_\_\_ has a remainder of \$ \_\_\_\_\_, of which \$ \_\_\_\_\_ shall be used for payments under the Proposed (Contract/Amendment/Purchase Order).
2. (Use same format for all applicable accounts)

I hereby certify that the certified funds are available in the above-mentioned accounts and that, as of this date, such funds are unrestricted, unobligated and available without future encumbrances or restrictions and that such funds will not be obligated except for the payment of the Proposed (Contract/Amendment/ Purchase Order) .

(Name)

(Position)

(Government Entity)

(Date)

9) Documentation

Are all the following documents included in the submission? For any documents not included in the submission, please provide explanation as to why not.

	<b>Document</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>	<b>Document Reference</b>
1.	Agency Certification Requirement, attached herein as Appendix B	<input type="checkbox"/>	<input type="checkbox"/>		
2.	Contractor Certification Requirement, attached herein as Appendix C	<input type="checkbox"/>	<input type="checkbox"/>		
3.	A formal estimate of the impact that the contract will have on compliance with the certified Fiscal Plan	<input type="checkbox"/>	<input type="checkbox"/>		
4.	Recommendation to award memo or another document containing rationale for the award	<input type="checkbox"/>	<input type="checkbox"/>		
5.	Copy of final contract	<input type="checkbox"/>	<input type="checkbox"/>		
6.	Fund Availability Certification for all accounts to be used for payments under the proposed contract or amendment (as attached herein).	<input type="checkbox"/>	<input type="checkbox"/>		
The following documents are only applicable to contracts relating to funding and reimbursements for disaster aid spending. N/A					
1.	Existing procurement policies	<input type="checkbox"/>	<input type="checkbox"/>		
2.	RFP package issued	<input type="checkbox"/>	<input type="checkbox"/>		
3.	Documentation regarding advertising of RFP	<input type="checkbox"/>	<input type="checkbox"/>		
4.	Internal independent cost estimate prepared as part of issuing the RFP	<input type="checkbox"/>	<input type="checkbox"/>		
5..	Evaluation criteria	<input type="checkbox"/>	<input type="checkbox"/>		
6.	Copies of the responses to RFP received	<input type="checkbox"/>	<input type="checkbox"/>		

	<b>Document</b>	<b>Yes</b>	<b>No</b>	<b>Document Reference</b>
7.	Copies of correspondence with bidder (Q&A, BAFO discussions, etc.)	<input type="checkbox"/>	<input type="checkbox"/>	
8.	Names of individuals who are part of the evaluation team(s)	<input type="checkbox"/>	<input type="checkbox"/>	
9.	Proposed evaluation and scoring records	<input type="checkbox"/>	<input type="checkbox"/>	
10.	Any other information, communications, or documentation that helps support or explain the procurement and resulting contract	<input type="checkbox"/>	<input type="checkbox"/>	

## APPENDIX B

### AGENCY CERTIFICATION REQUIREMENT

The following certification shall be provided to the Oversight Board by each agency submitting contracts for review:

1. [Name of Agency], its officials and employees have complied with all applicable conflicts of interest laws, rules, regulations and policies in connection with the procurement and negotiation of the contract.<sup>5</sup>
2. To the best knowledge of the signatory (after due investigation), no person has unduly intervened in the procurement, negotiation or execution of the contract, in contravention of applicable law.
3. To the best knowledge of the signatory (after due investigation), no person has: (i) offered, paid, or promised to pay money to; (ii) offered, given, or promised to give anything of value to; or (iii) otherwise influenced any public official or employee with the purpose of securing any advantages, privileges or favors for the benefit of such person in connection with the contract.
4. To the best knowledge of the signatory (after due investigation), neither the contractor, nor any of its owners<sup>3</sup>, directors, officials or employees, or its representatives or subcontractors, has required, directly or indirectly, from third persons to take any action with the purpose of influencing any public official or employee in connection with the procurement, negotiation or execution of the contract.

The above certification shall be signed by the head or general counsel of the agency submitting the contract for review.

In the event that the agency is not able to provide any of the above certifications, it shall provide a written statement setting forth the reasons therefor.

By:

Date:

Signature:

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<sup>5</sup> As used herein, the term "contract" is inclusive of any amendments, modifications or extensions. <sup>3</sup> For purposes of this certification, a contractor's "owner" shall mean any person or entity with more than a ten percent (10%) ownership interest in the contractor.

## APPENDIX C

### Contractor Certification Requirement

The following certification shall be provided to the Oversight Board and the Commonwealth's Contracting Government Entity by the Chief Executive Officer (or equivalent highest rank officer) of each proposed contractor under contracts submitted for review:

1. The expected contractor's subcontractor(s) in connection with the proposed contract<sup>6</sup> is (are) the following:

(Name of individual or firm, including names of principals, principal stakeholders, and owners of the latter)

(Principal terms and conditions of the contractual relation and role of the subcontractor)

(Amount of proposed contract payable to each subcontractor)

2. Neither the contractor nor any of its owners<sup>7</sup>, partners, directors, officials or employees, has agreed to share or give a percentage of the contractor's compensation under the contract to, or otherwise compensate, any third party, whether directly or indirectly, in connection with the procurement, negotiation, execution or performance of the contract, except as follows:

(Name of individual or firm, including names of principals, principal stakeholders, and owners of the latter)

(Principal terms and conditions of the compensation sharing arrangement and consideration for such benefit)

3. To the best knowledge of the signatory (after due investigation), no person has unduly intervened in the procurement, negotiation or execution of the contract, for its own benefit or that of a third person, in contravention of applicable law.

4. To the best knowledge of the signatory (after due investigation), no person has: (i) offered, paid, or promised to pay money to; (ii) offered, given, or promised to give anything of value to; or (iii) otherwise influenced any public official or employee with the purpose of securing any advantages, privileges or favors for the benefit of such person in connection with the contract (such as the execution of a subcontract with contractor, beneficial treatment under the contract, or the written or unwritten promise of a gift, favor, or other monetary or non-monetary benefit).

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<sup>6</sup> As used herein, the term "contract" is inclusive of any amendments, modifications or extensions.

<sup>7</sup> For purposes of this certification, a contractor's "owner" shall mean any person or entity with more than a ten percent (10%) ownership interest in the contractor.

5. Neither the contractor, nor any of its owners, partners, directors, officials or employees or, to the best of its knowledge (after due investigation), its representatives or sub-contractors, has required, directly or indirectly, from third persons to take any action with the purpose of influencing any public official or employee in connection with the procurement, negotiation or execution of the contract, in contravention of applicable law.
6. Any incorrect, incomplete or false statement made by the contractor's representative as part of this certification shall cause the nullity of the proposed contract and the contractor must reimburse immediately to the Commonwealth any amounts, payments or benefits received from the Commonwealth under the proposed contract.

The above certifications shall be signed under penalty of perjury by the Chief Executive Officer (or equivalent highest rank officer) in the following form:

"I hereby certify under penalty of perjury that the foregoing is complete, true and correct."

By:

Date:

Signature: